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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GRANT T. LINDSAY, F. BRUCE STEVENS,
RUSSELL M. RASMUSSEN, and THOMAS C. LABAU,
Petitioners,

v.

THIOKOL CORPORATION and THIOKOL
CORPORATION PENSION PLAN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Thiokol's Brief In Opposition ("Opp.") is primarily an effort to convince the Court that the question raised in the Petition is not fairly presented by the case. Secondarily, the Opposition is an effort to show that in any event, the question should be resolved in Respondents' favor, either because Thiokol could have effected the same reduction in benefits without changing normal retirement age or because the law permits the establishment of normal retirement ages over age 65. However, once Thiokol's arguments are compared with the record and the undisputed factual findings of the courts below, the truth emerges with considerable clarity that this case represents an ideal vehicle to settle a question of broad national importance to millions of working men and women and their families. Moreover, it is quite clear that when the language of the statute at issue, its legislative history and its interpretation by the pertinent administrative agencies are fairly considered, there is strong reason to believe that the case below was wrongly decided. The Petition should be granted.

1. The Brief in Opposition can be read to suggest that the challenged amendment was somehow necessitated by the Tax

Reform Act of 1986 (Opp. at 2). However, in the proceedings below, Thiokol was explicit that it could have complied with the Tax Reform Act without making any change in the normal retirement age. [1] There should thus be no confusion concerning any implication that the setting of a normal retirement age in excess of age 65 was necessitated by any legislation. It was not. Companies do not have to raise normal retirement ages for their retirement plans; they *want* to—and have begun doing so [2]—for the reasons of corporate self-interest discussed in the Petition and not disputed in the Opposition.

2. So, too, with Thiokol's representation that Petitioners' benefits were in fact not lowered at all by the challenged increase in normal retirement age. (Opp. at 2, 9, 14.) In the district court, Thiokol unsuccessfully moved to dismiss for lack of standing based on that same assertion. Aplt. App. at 120. The assertion is demonstrably incorrect and was found to be so by the district court; as the district court found in denying Thiokol's motion, Petitioners receive "substantially" smaller monthly benefits than each of them would be receiving if normal retirement age were still age 65, any *other* changes Thiokol made to its plan notwithstanding. (Pet. App. 12a.)

Indeed, this must be so for two reasons. Tellingly, Thiokol has disputed neither in its Brief In Opposition. First, the higher that normal retirement age is set, the fewer the number of workers who will attain it, whether due to layoffs, plant relocations, illnesses or other causes. (Thus Thiokol predicted that fully 80% of its pension plan participants would not achieve the new normal retirement age of 67. Aplt. App. 221, 230.) Workers that do not attain "normal retirement age" and receive a "normal retirement pension" will therefore receive a *reduced* "early retirement" pension.

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1. The Court: But Ms. Wood, the Plan could have been amended to comply with the new Tax laws without changing the age from 65 ....

Ms. Wood: It absolutely could have done it...." Aplt. App. at 1489-90.

2. Thus the Opposition makes the point that Thiokol is not alone in raising normal retirement age above 65, that "*other* plans have adopted benchmarks over 65." Opp. at 8; emphasis added. Thiokol made the same point to the court below; at page 30a of the Appendix to the Petition is a list of thirty major corporations across the country that Thiokol identified as having adopted normal retirement ages in excess of age 65.

The second truth follows from the first: the higher that normal retirement age is set, the smaller the early retirement pension that the workers receive. It is a simple matter of mathematics: an employee receiving a pension at age 63 suffers a *two*-year reduction in the size of his or her pension if the normal retirement age is 65 (roughly 13%), but suffers a *four*-year reduction (roughly 26%) if the normal retirement age is 67, a *seven*-year reduction (more than 35%) if it is set at age 70, and so forth. It therefore follows inevitably that an increase in normal retirement age beyond age 65 is going to mean that more workers will receive a smaller pension at retirement, and the higher the normal retirement age is set the smaller those pensions will be. Thus, while the Opposition asserts that "the decision in this case will not make a dime's worth of difference to other workers and pensioners in this country" (Opp. at 4), that assertion is untenable. Quite to the contrary, the decision in this case will affect profoundly the lives of millions of workers and their families.

3. The rule announced by the court below—that ERISA does not impose a limit of age 65 on how high plans can set their "normal retirement age"—had nothing to do with the particulars of Thiokol's plan and was in no way fact-specific. Nor did it turn on the fact that Thiokol's new normal retirement age was 67 rather than some higher age. As Thiokol expressly argued below, it could just as easily have been age 80 or 90. (Aplt. App. at 1494.) Rather, the court below announced a broad rule that employers are not limited by ERISA in setting normal retirement ages in excess of age 65, and was explicit that the appeal presented "a pure question of law."

4. As a last means of arguing that the question is not of significance, Thiokol argues that by manipulating other aspects of the retirement formula it could have achieved the same reduction in petitioners' pensions without increasing the normal retirement age beyond age 65. (Opp. at 3, 8, 9.) It would make no difference if respondents were correct in their assertion of what they claim they might have done. [3] What Thiokol *might* have done is irrelevant.

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3. The accuracy of Thiokol's assertion that benefits could have been lawfully lowered to the same level by clearly permissible means has never been tested, litigated nor passed upon by any court. Respondents first

This Court has never countenanced the argument that illegal conduct should be excused if the same result could have been achieved by legal means. [4]

5. When it turns to the merits, Thiokol is correct in stating that the term "normal retirement age" predated ERISA (Opp. at 6), but is incorrect—and this is the nub of the controversy—in asserting that the term "is distinct from ERISA's statutory uses." (*Id.*) Quite the opposite, it is precisely *because* the term predated ERISA that ERISA addressed it and set limits on how high employers could establish the normal retirement age in their plans.

The plain wording of the statute leaves no room for dispute on this question. Both "mirror image" definitions of "normal retirement age"—29 U.S.C. § 1002(24) and 26 U.S.C. § 411(a)(8)—unambiguously cap it at age 65. Only by continuing to ignore the plain wording of the statute is Thiokol able to construct its argument that the statutory definition is "for purposes of ERISA" but *not* plan documents. Tellingly, in making this argument, the Opposition does not even mention ERISA's coverage provision, 29 U.S.C. § 1003(a), which expressly provides that the definitions set out in the statute (including the statutory definition of normal retirement age) "shall apply to any employee benefit *plan*." (*See* Petition at 9.) While it seems too clear for debate that the limit on normal retirement ages established by 29 U.S.C. § 1002(24) would have to apply to pension plans, 29 U.S.C. § 1003(a) makes the obvious explicit. The Opposition's complete

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suggested this possibility in their reply memorandum in support of their motion for summary judgment in the district court. Aplt. App. at 645-46. Since the matter had never been raised before and there had been no discovery on it, plaintiffs moved to strike. Aplt. App. at 928. The motion to strike was briefed, but not ruled upon by the district court. The documents reproduced in Appendix A to the Brief In Opposition were visual aids, not admitted exhibits, used by Thiokol in oral argument in the district court, never subject to discovery or examination or any legal ruling.

4. See, for example, *Commissioner v. National Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134, 149 (1974):

> To make the taxability of the transaction depend upon the determination whether there existed an alternative form which the statute did not tax would create burden and uncertainty.

silence on this point—which goes to the very heart of its main argument—cannot be an oversight.

6. Similarly, Thiokol does not cite a single instance—not one—in ERISA's entire legislative history where any senator, congressman or committee report at any point indicated, much less stated, that normal retirement ages greater than age 65 were permissible for plans after the enactment of ERISA. Nor could it. As demonstrated in the Petition (at 9-11), the legislative history is indubitably clear that in passing ERISA Congress intended that no plan would be permitted to have a normal retirement age in excess of 65 and said so repeatedly and plainly. As the Joint Explanatory Statement of the House and Senate Conference Committee of the final version of ERISA stated, "Normal retirement age generally is to be the age specified in the plan. However, *it may not be later than age 65****." (Emphasis added.) Significantly, Respondents do not dispute that the Petition has accurately set forth this Court's jurisprudence on the importance of interpreting a statute in accordance with clearly expressed congressional intent. Instead, they simply ignore that clearly expressed intent in their Brief In Opposition.

7. Thiokol offers no defense for the failure of the court below to examine or even mention the agency views on the question presented. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). With respect to the PBGC regulation, with its clear statement that "Normal retirement age means the age specified in the plan" and that "this age shall not exceed *** age 65 ****," 29 C.F.R. § 400.12 (1996), and the similar regulations cited in the Petition (Pet. at 11-13), Thiokol dismisses them as "ambiguous" (Opp. at 12). The sole regulation cited by Thiokol, 26 C.F.R. § 1.411(a)-7(a) (Opp. at 13) makes no mention of how high a normal retirement age may be, much less make any provision for a normal retirement age in excess of 65. [5]

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5. Thiokol refers (Opp. at 3) to its obtaining an IRS determination letter from a Texas district office over the *pro se* objection of two of the Petitioners here. Notably, Thiokol has correctly abandoned any argument that the issuance of a determination by a district office is entitled to deference. As noted in the Petition (footnote 11), in May of 1996 the IRS subsequently expressed its agreement *with Petitioners' position* that "[t]he

Thiokol protests that Petitioners have cited no regulations "governing the *benchmark* age ..." Opp. at 13; emphasis added. This concept of "benchmark" age is not part of ERISA; **it exists only in Respondents' briefs**. ERISA does not speak of a "benchmark" age or use any such concept, and Respondents neither in their Opposition nor at any time in this litigation have ever offered any authority for it. It is their own invention.

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latest normal retirement date permitted under the statute is age 65." Petition at 29a.

CONCLUSION

Thiokol cannot dispute the significant effect that increasing normal retirement age has on workers. Accordingly, it is left to argue that the decision below will impact on no other workers (Opp. at 8) *not* because normal retirement ages in excess of 65 will not have a significant negative effect on them, but, rather because of the argument that the decision below "changes no law" and that employers have "always been free" to take such actions. (*Id.*) With respect, this begs the question. Regardless of which side has offered the correct answer to the question presented by the Petition, there cannot be legitimate debate as to the impact on millions of workers that the answer to that question will have. The Petition should be granted.

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Respectfully submitted,

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